

*In the Matter of the Alternative Workweek Program, Department of
Environmental Protection*

CSC Docket No. 2011-3664

(Civil Service Commission, decided April 6, 2011)

The Communications Workers of America (CWA), represented by Rosemarie Cipparulo, Esq., requests a stay of the approval of the modification of the Department of Environmental Protection's (DEP) Alternative Workweek Program (AWP) by the Chair/Chief Executive Officer (Chair/CEO) of the Civil Service Commission (Commission) pending its appeal to the Superior Court of New Jersey, Appellate Division.

By way of background, on November 8, 2010, DEP submitted a request to the Chair/CEO for approval of its revised AWP. After an initial review, this agency advised DEP to provide a statement verifying union consultation with regard to its AWP and provide further clarification of its revisions. Thereafter, on December 1, 2010, DEP submitted a revised request to the Chair/CEO to approve its modified AWP. DEP presented that "[i]ssues with AWP have become more obvious especially as managers face decreasing staffing levels and diminishing morale." To deal with the issues, DEP presented the following modifications to be effective March 12, 2011: eliminating dual participation in AWP and the Voluntary Furlough Program (*N.J.A.C.* 4A:6-1.23); permitting only 1 AWP day off per pay period; designating Fridays as the only day off; suspending AWP during a pay period in which there is a holiday; disallowing the use of vacation, compensatory, or paid leave bank days in conjunction with the AWP day; requiring employees to work at least from 9:00 a.m. to 4:00 p.m., but no earlier than 8:00 a.m.; and noting that all employees must work a minimum of 7.5 hours per day. Further, the revised AWP included a provision that allowed employees to request an exception to the modified AWP. DEP maintained that the modifications would provide it with "the ability to maintain optimum staffing levels during a pay period, while still offering employees the opportunity of a shortened workweek in which to attend to family and life issues." It also asserted that the restriction of Fridays as the only AWP day off would enhance its "customer service abilities." Further, DEP stated that "these modifications will better serve the public while still affording employees with a privilege extended to them for the past 18 years." It also advised that on November 12 and November 18, 2010, it met with CWA. At that time, it informed CWA that it would be terminating the program. However, after further review, DEP decided to submit a modified AWP plan to the Chair/CEO. On December 20, 2010, the Assistant Director of Classification and Compensation with this agency wrote to DEP, advising that the revisions to its AWP were reviewed and were "consistent with the provisions of

*N.J.A.C. 4A:6-2.7.*¹ Thus, DEP's modified AWP was approved. It is noted that on December 2, 2010 prior to the approval, DEP sent a department-wide e-mail to employees describing the modifications and advising the employees of the March 12, 2011 effective date.

By letters dated January 3, 2011 and January 13, 2011, CWA objected to the approval of the modified AWP, requesting that DEP be required to engage in further consultation with the union and affected employees. It indicated that 1,659 employees or approximately 57% of employees of DEP participate in AWP. CWA argued that the modification eliminated approximately half of the year during which AWP can be taken by suspending AWP during a pay period in which there is a holiday. Moreover, it maintained that DEP sent the Chair/CEO an earlier modification request, dated November 8, 2010, prior to consulting with the union and DEP misrepresented to CWA that it was going to eliminate AWP altogether. Given the foregoing, CWA contended that DEP's discussion with the union was in bad faith and violated *N.J.A.C. 4A:6-2.7(i)*. Thus, it maintained that the Commission should reject the modification request or refer the matter to a neutral arbiter. Further, CWA claimed that despite DEP's position that it needed to curtail AWP for operational and customer service reasons, DEP never gave any specifics. In addition, CWA maintained that DEP failed to meet the standards set forth in *N.J.A.C. 4A:6-2.6(d)* to modify its AWP, in particular, it did not submit sufficient justification for the change or statistical data to support the modified program. Moreover, CWA indicated that the modified AWP disregards the primary motivation for implementation of the program in the 1990's, which was to reduce air emissions through reduced commutes per week.

On January 19, 2011, the Chair/CEO responded to CWA's request to reject DEP's modified AWP or to defer the matter to an arbiter. He indicated that *N.J.A.C. 4A:6-2.7(i)* was not violated since the regulation does not mandate union consultation. Rather, it provides that appointing authorities merely "should" consult with the unions prior to implementation of AWP's. However, the Chair/CEO emphasized that DEP did in fact consult with CWA prior to the modified AWP's implementation, which was effective March 12, 2011. Furthermore, the CEO/Chair advised that approval of the modified AWP was not contingent upon union agreement, but was subject to approval by this agency. Thus, the Chair/CEO denied CWA's request. CWA replied on February 21, 2011, arguing that the Chair/CEO had no authority to approve

¹ It is noted that the former Commissioner of Personnel would refer AWP requests to the Classification and Compensation unit for processing. In line with that past practice, DEP's request in this matter was reviewed by the Classification and Compensation unit and the Assistant Director of Classification and Compensation rendered a decision.

the modified AWP, as the full Commission must render a determination in written record appeals, pursuant to *N.J.S.A.* 11A:2-6(b). Further, CWA asserted that a conflict was created when the Chair/CEO was involved in the initial decision of DEP before consultation with the union. Therefore, CWA maintained that it was imperative that the full Commission render a decision. In a letter response, dated February 24, 2011, the Chair/CEO advised that DEP's establishment of an AWP and the approval of such a program are not matters subject to appeal under *N.J.S.A.* 11A:2-6(b). Further, he stated that the Commission does not have the authority to mandate that DEP participate in such a program. *See In the Matter of the State Voluntary Furlough Program for Fiscal Year 2011* (CSC, decided June 23, 2010) (In denying the petitioners' requests to extend the eligibility requirement for voluntary furlough, the Commission indicated that "the rules governing the permitted alternatives [such as flex-time programs, AWP, and adjusted hours of operation] are permissive in nature and the Commission does not have the authority to mandate an appointing authority to participate in any of these programs.")

In the instant matter, CWA seeks a stay of the approval of DEP's modified AWP by the Chair/CEO pending its appeal to the Appellate Division that the Chair/CEO lacked the authority to approve the modifications to the AWP and should have presented the matter to the entire Commission. It maintains that employees will suffer irreparable harm, which money damages cannot repair, if the stay is not granted. CWA emphasizes that more than 1600 employees participate in the AWP, which has been in effect since the 1990's. The employees rely on the AWP for child care, for elder care, and to tend to medical issues. Furthermore, CWA reiterates that the Chair/CEO "acted outside his authority when he unilaterally approved the DEP AWP modifications" rather than submit the proposal to the Commission for approval. It submits that the Legislature eliminated the Department of Personnel, the Merit System Board, and the Commissioner of Personnel and transferred duties to the entire Commission. Thus, the Chair/CEO had no authority to render a determination. Moreover, CWA presents that DEP will not suffer any harm if this stay request is granted. AWP has been in place for many years and any hardship will fall on the employees and not DEP.

In response, DEP maintains that it is unlikely that CWA will be successful in its appeal to the Appellate Division since DEP was in compliance with Civil Service law and rules pertaining to its AWP request. Additionally, it states that employees have numerous other options to address life situations, such as taking personal leave time, applying to participate in DEP's Voluntary Furlough Program, and requesting federal and State Family leave, etc. DEP also maintains that a stay of its modified AWP will adversely affect DEP's "ability to meet its core mission to protect

the public health and environment of the State.” It submits that it would be in the public interest to modify the AWP to address management challenges in providing necessary services. In this regard, the former AWP permitted the majority of employees to take a day off each week of the year, and if the day fell on a holiday, employees were allowed to choose another day of the week as an AWP day. DEP asserts that, with the modified AWP, DEP will have the “ability to maintain optimum staffing levels on any given day of the week.” Therefore, it urges the Commission to deny CWA’s request for stay.

In response, CWA reiterates that the Chair/CEO did not have the authority to approve the AWP modifications because of the statutory amendment conferring all powers from the former Commissioner of Personnel to the entire Commission. Thus, it contends that the Commission must stay the changes to the AWP until a proper review of the modifications is conducted by the Commission. Alternatively, it urges the Commission to reject the modification based on DEP’s failure to adhere to the standards for modification under *N.J.A.C. 4A:6-2.6(d)*. Specifically, it argues that DEP did not provide a statement of impact on services to the public or agency clientele. *See N.J.A.C. 4A:6-2.6(d)2*. Although DEP indicated that customer service would improve by modifying the AWP, DEP fails to explain how the improvement will actually occur or how customer service suffers under the current AWP. For example, CWA states that there is an advantage to the public to allow employees to work prior to 8:00 a.m. since an inspector would be able to visit more sites in an extended day. CWA also contends that DEP failed to advise how individual flexitime schedules and changes would be approved pursuant to *N.J.A.C. 4A:6-2.6(d)6*. It notes that although the modified AWP includes a provision to allow employees to request an exemption, it states that “[e]ach and every exemption request was denied, regardless of reason . . . even for dire health or family consideration.” CWA submits certifications of two employees as examples of how the modified AWP is severely affecting these employees. One employee explains that his daughter, who was born prematurely in 2009, cannot be placed in day care due to health issues. With the former AWP, he and his wife, who is also a DEP employee, were able to have a four-day compressed workweek and use voluntary furlough to take care of their daughter. Another employee states that she has multiple sclerosis and was previously allowed to work four days and arrive at work before 8:00 a.m. to have access to a close parking space and leave prior to 4:00 p.m. She indicates that she gets “tremendously fatigued” by 4:00 p.m., which makes her commuting dangerous. Both employees note that they have successfully worked in their positions under the former AWP. CWA maintains that there is no evidence to support the assertion that paid sick leave or unpaid leave will address the foregoing concerns or that vacation leave would be approved to address these concerns. It is noted that the agency has also received numerous e-mails from DEP

employees, explaining the effect of the modified AWP on their lives, objecting to the revised AWP, and requesting that the Commission reject the same.

Furthermore, CWA takes exception to DEP's statement that the modified AWP would meet its core mission to protect the health and environment of the State. It asserts that the statement is vague and contrary to facts. In regard to the latter, it submits that a compressed workweek reduces commutes and the use of vehicles, thereby reducing air emissions and pollution. Moreover, CWA presents that the Clean Air Act Amendments of 1990 required employers of over 100 employees to comply with mandatory trip-reduction programs for commuting employees. In response, DEP developed Employer Trip Reduction (ETR) Programs and one of the components of the current program includes the AWP. CWA contends that DEP cannot justify promoting such programs on its website as part of its mission to reduce air emissions and then reduce the AWP for its own employees, causing an increase of nitrous oxide in the air per year. Finally, CWA contends that DEP "is reneging on prior statements to the Commission of the effectiveness and benefits of AWP." In that regard, it states that when the Commission no longer extended the voluntary furlough program by rule relaxation, it required DEP to submit a plan to address the employees' need for flexible work hours while balancing operational needs. CWA indicates that DEP pointed mainly to its "mature AWP."

CONCLUSION

CWA requests a stay of the Chair/CEO's approval of DEP's modified AWP pending its appeal to the Appellate Division. It contends that the Chair/CEO lacked the authority to approve the revisions due to statutory amendments and argues that DEP failed to comply with the requirements for modification. *N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating a request for stay:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Also, *N.J.A.C.* 4A:2-1.2(f) allows a party, after receiving a final administrative decision by the Commission and upon filing an appeal to the Appellate Division, to petition the Commission for a stay pending the decision of the Appellate Division. *See also, N.J. Court Rules* 2:9-7.

Initially it must be emphasized that the function of administrative agencies and their place in the governmental scheme are well established.

Gloucester County Welfare Board v. Civil Service Commission, 93 N.J. 384, 389 (1983). Agencies like the Civil Service Commission are properly categorized as part of the executive branch of government in that they “exercise executive power in administering legislative authority selectively delegated to them by statute.” *Id.* (citing *City of Hackensack v. Winner*, 82 N.J. 1, 28 (1980)). Recognizing the executive function of administrative agencies, courts are aware that the judicial capacity to review administrative actions is limited. *Id.* at 390.

Moreover, courts can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy. Although sometimes phrased in terms of a search for arbitrary or unreasonable agency action, the judicial role in reviewing agency acts is restricted to three inquiries: (1) whether the agency’s action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. *See Karins v. City of Atlantic City*, 152 N.J. 532, 540 (1998); *Mazza v. Board of Trustees, Police and Firemen’s Retirement System*, 143 N.J. 22, 25 (1995) (citing *Campbell v. Department of Civil Service*, 39 N.J. 556, 562 (1963)).

In furtherance of this policy courts have enunciated several principles. The grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature’s goals. *Gloucester County Welfare Board*, 93 N.J. at 390 (citing *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 88 N.J. 317, 325 (1982)). A strong presumption of reasonableness accompanies an administrative agency’s exercise of statutorily-delegated responsibility. *Id.* at 390-391. (citing *City of Newark v. Natural Resources Council*, 82 N.J. 530, 539 (1980), *cert. denied*, 449 U.S. 983 (1980). “[C]ourts are not free to substitute their judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable . . .” *Id.* at 391 (citing *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562-63 (1978)). “[T]he generally accepted gauge of administrative factual finality is whether the factual findings are supported by substantial evidence.” *Id.* (citing *Freud v. Davis*, 64 N.J. Super. 242, 246 (App. Div. 1960)). That issue has sometimes been stated: “Could a reasonable man, acting reasonably, have reached the decision sought to be reviewed, from the evidence found in the entire record, including the inferences to be drawn therefrom?” *Id.*

Upon review of the total record, CWA has not presented a clear likelihood of success on the merits of its appeal to the Appellate Division. In this regard, the instant matter involves the statutory changes which took effect in 2008. Specifically, on June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission. As a result, *N.J.S.A.* 11A:2-6(b) was amended to make reference to the authority of the Commission, rather than the Merit System Board, to render final administrative decisions on written record appeals. *N.J.S.A.* 11A:2-11 was also amended to reflect the transfer of additional powers and duties of the Commissioner of Personnel to the Commission. In that regard, *N.J.S.A.* 11A:2-11(e) authorized the Commission to “plan, evaluate, administer and implement personnel programs and policies in State government and political subdivisions operating under this title.” Further, *N.J.S.A.* 11A:6-24 was amended to reflect the Commission’s power to “adopt rules for the implementation of hours of work, overtime compensation, and holiday pay programs, which shall include but need not be limited to application and eligibility procedures.” With regard to the establishment, modification, and termination of AWP’s, *N.J.A.C.* 4A:6-2.7 provides in relevant part that:

(a) Appointing authorities may establish alternative workweek programs, such as a four day workweek, to accommodate operational and/or employee needs.

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(c) An appointing authority may limit participation in an alternative workweek program to selected groups of job titles, work units and/or work locations to accommodate operational needs.

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(e) Appointing authorities shall develop, subject to Department of Personnel approval, appropriate sick, vacation and administrative leave schedules for employees participating in an alternative workweek program.

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(g) Establishment, modification or termination of an alternative workweek program shall not become effective without the approval of the Commissioner. Requests for these actions must be submitted at least 30 days in advance of

the proposed effective date to the Department of Personnel and shall include the same items listed in *N.J.A.C. 4A:6-2.6(d)*.

(h) An appointing authority may authorize a complete or partial temporary suspension of the alternative workweek program if required by operational needs. Within 10 days of the suspension of the program, the appointing authority shall submit to the Commissioner a fully detailed justification and specify the duration of the suspension.

(i) Appointing authorities **should** consult with affected negotiations representatives concerning alternative workweek programs before implementation.

Moreover, *N.J.S.A. 11A:11-3* provides in relevant part that a regulation which refers to the Department of Personnel, Commissioner of Personnel, or Merit System Board shall mean the Commission.

Although it is clear that the Department of Personnel was abolished, it was never the intention of the Legislature to take away the agency's responsibility to perform **administrative day-to-day tasks**, such as rendering determinations on matters concerning examinations, eligible lists, classification, layoffs, and in this case, approval of AWP modifications. These decisions are appropriately made by agency staff, and the head of this agency is the Chair/CEO. The Legislature specifically established that the "chairperson will be the chief executive officer and administrator of the commission and is to devote full time the duties of the position." Assembly Budget Committee Statement, Public Law 2008, Chapter 29. In fact, a rule amendment clarifies the legislative intent that the Chairperson serves as the administrator, the CEO, and the appointing authority of the agency. *See 43 N.J.R. 336(a).*² The CEO portion of the title would be superfluous unless there was an agency to administer the day-to-day responsibilities, which are not and cannot be performed by part-time Commission members. It must be emphasized that the Commission meets only once or twice a month and retains its adjudicative and rulemaking authority while the Chair/CEO performs the administrative duties associated with the day-to-day operation of the agency. If the ability of the agency and Chair/CEO to perform administrative tasks were to be eliminated, the operation of the agency to implement the Civil Service Act would come to a halt. Clearly, the Legislature could not have intended such a result.

² The public hearing on the rule proposal was held on March 17, 2011, but no member of the public appeared to present comments on the proposal. If CWA has a comment on the rule proposal, it may submit a written comment by April 23, 2011.

In other words, the statutory amendment does not change the meaning of every rule delineated in Title 4A of the Administrative Code or function which must be performed by the agency or Chair/CEO. It would be absurd for the Legislature to say that every function set forth in the rules must now be performed by the part-time Commission members, and that no functions are performed by the full-time staff. As indicated above, administrative day-to-day tasks are performed by this agency. For example, *N.J.A.C. 4A:3-3.1(a)* provides that “**E**ach position in the career and unclassified services shall be assigned by the [Civil Service Commission] to a job title.” (emphasis added) There are nearly 200,000 positions in State and local service. Surely, the Legislature could not have intended that the part-time Commission members would take on this responsibility. Other regulations address functions that must be acted on by this agency, including *N.J.A.C. 4A:3-3.3*, which provides that this agency shall implement and administer classification plans; *N.J.A.C. 4A:4-2.2*, which provides that this agency shall administer examinations for appointment in the competitive division of the career service; *N.J.A.C. 4A:4-3.1*, which provides that this agency shall establish eligible lists; *N.J.A.C. 4A:4-4.2*, which provides that this agency shall issue or authorize the issuance of certifications to appointing authorities containing the names and addresses of the eligibles with the highest rankings on the appropriate list; *N.J.A.C. 4A:4-5.2(a)2*, which provides that, in State service, this agency may extend on request of an appointing authority a working test period; *N.J.A.C. 4A:4-7.1*, which provides that this agency shall approve temporary and emergency transfers; *N.J.A.C. 4A:8-1.1(b)*, which provides that this agency shall determine seniority and shall designate lateral, demotional and special reemployment rights for all career service titles prior to the effective date of the layoff; and *N.J.A.C. 4A:8-1.4(a)*, which provides that this agency shall approve layoff plans.

In addition, it is well established that substantial deference is made to an administrative agency’s interpretation and application of its own regulations provided that they do not contravene legislative dictate or policy. *See e.g., Manuel Gonzalez v. Essex County Welfare Board*, Docket No. A-341-93T1 (App. Div. March 18, 2004). In *Gonzalez*, the Merit System Board awarded back pay to an employee pursuant to a retroactive application of an amended regulation. The Appellate Division determined that it was within the Merit System Board’s authority and discretion to accord retroactive effect since there was no doubt that the regulation was not intended to accord new substantive rights, but rather, it was intended to codify long-standing policy and prior course of action. Similarly, in the present case, it was appropriate for the Chair/CEO as the administrator of the agency to address the objections of CWA and grant final approval of the modified AWP as was previously done by the Commissioner of Personnel under the language of *N.J.A.C. 4A:6-2.7* prior to the statutory amendment. It was not the intention

of the Legislature, as fully explained above, to make a substantive change to the approval process. It is reiterated that the rule amendment addresses the role of the Chair/CEO. Thus, final approval on administrative matters, such as AWP modifications, must rest with the Chair/CEO or his authorized delegate. Therefore, based on the foregoing, CWA has not presented a clear likelihood of success on the merits of its appeal to the Appellate Division.

Additionally, CWA contends that DEP failed to comply with the requirements for modification of its AWP as it did not present sufficient justification. Employees also submit that the changes will adversely affect their personal lives. It is emphasized that an appointing authority has the discretion to establish an AWP. *N.J.A.C. 4A:6-2.6(a)* provides in part that appointing authorities **may** establish alternative workweek programs. However, once an AWP is established, a request to modify the program must be submitted to this agency and include items listed in *N.J.A.C. 4A:6-2.6(d)* as follows:

1. Justification which relates the requested action to operational and employee needs;
2. Statement of impact on services to the public or agency clientele;
3. Details of the core time, flexible time and meal periods;
4. Groups of job titles, work units and/or work locations to be covered by the program;
5. Procedures governing employee participation in the program;
6. Approval procedures for individual flexitime schedules and changes;
7. Provisions for giving employees at least two weeks' notice of termination of the program;
8. Monitoring and evaluation procedures; and
9. Name, address and telephone number of the program administrator.

The Commission disagrees with CWA that DEP failed to present information to meet the items listed in *N.J.A.C. 4A:6-2.6(d)*. DEP presents that in order to serve the public better and to address decreasing staffing levels, a modified AWP was necessary. Regardless of the motivation in establishing the program, DEP's current concern involves staffing. Indeed, modifying the program as presented will provide optimum staffing levels during a pay period. The Commission is satisfied that DEP presented sufficient justification. Further, the modification request gives details regarding the core time, procedures, and effective date. Thus, CWA has

failed to demonstrate a clear likelihood that it would be successful in challenging the approval of the modified AWP.

In addition, although the former AWP had been implemented for many years, it must be reiterated that AWP's are discretionary. Modification of an AWP does not take away an employee's entitlement. Moreover, the employees were provided with the intended modifications by e-mail on December 2, 2010 and have been provided with well more than two weeks' notice. Thus, there is no danger of immediate or irreparable harm in the approval of the modified AWP by the Chair/CEO. The employees have had ample notice of the revisions to the AWP and may adjust their lives accordingly. The Commission notes that State workers are afforded generous leave time and may request a leave of absence without pay to attend to personal issues or participate in DEP's Voluntary Furlough Program. *See N.J.A.C. 4A:6-1.1 et seq.* and *N.J.A.C. 4A:6-1.23*. It is in the public interest to approve this AWP modification and not grant the stay request. DEP submits that it would be able to better serve the public if there is an optimum staffing level. DEP is in the best position to ascertain the needs of its customers, who may be adversely affected should further issues arise in staffing.

As a final note, CWA takes issue with the timing of DEP's consultation. However, DEP did consult with the union prior to implementation of the modified AWP. CWA does not present a convincing argument that a conflict of interest existed with the Chair/CEO or this agency. The record demonstrates that in processing the request, the Classification and Compensation unit ensured that DEP provided a statement that it met with the union. It also requested clarification of DEP's revisions. Thus, rather than exhibiting a conflict of interest, the Classification and Compensation unit demonstrated a competent review of DEP's request and ensured that DEP was in compliance with regulatory criteria.

The Commission notes that the main issue in this stay request involves the Chair/CEO's denial of CWA's request to present DEP's modifications of its AWP to the entire Commission for approval. Since the entire Commission has approved DEP's modified AWP, the stay request is arguably moot. Nonetheless, the Commission has considered the established criteria for granting a stay and does not find sufficient cause to grant CWA's request. The Commission has also carefully reviewed the modified AWP and adopts the decision of the Assistant Director of Classification and Compensation, and the final approval of the Chair/CEO, that DEP's revised AWP is "consistent with the provisions of *N.J.A.C. 4A:6-2.7*." Accordingly, the Commission approves DEP's modified AWP.

ORDER

Therefore, it is ordered that the request for a stay be denied. It is further ordered that the modification of DEP's AWP is approved.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.